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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Petition of MCI
for Declaratory Ruling

)
) CC Docket No. 96-98
) File No. CCBPol 97-4
)

REPLY COMMENTS OF U S WEST, INC.

Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2859

Attorney for

U S WEST, INC.

Of Counsel,
Dan L. Poole

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SUMMARY

Herein, U S WEST argues that the approach taken by the Texas PUC¹ to the matter of additional licensing to access or use third-party intellectual property, within the context of interconnection, resale, and purchase of unbundled network elements, is eminently reasonable from both a regulatory and commercial perspective. That approach places obligations on ILECs to identify those contracts which might not permit CLECs to access or make use of third-party intellectual property without additional licensing authority; and to use appropriate reasonable commercial efforts to facilitate both discussions and negotiations between CLECs and owners of intellectual property. However, it does not burden the ILECs with the impossible burden and responsibility of being responsible for securing the requisite licenses or negotiating the geographic or business scope of the license or the corollary price to be paid. As the Texas PUC has observed, this approach pays due deference to Congress' desire to open up new markets and to increase competition without interfering with the intellectual property rights of parties -- rights regarding which there is no suggestion in the Telecommunications Act of 1996 that Congress meant to disturb.

U S WEST was identified by AT&T as being a LEC that supported the idea that CLECs should secure their own licenses where existing ILEC license agreements do not demonstrate the requisite authority to allow such access or use. AT&T is correct that U S WEST has reserved the right to require that CLECs

¹ All acronyms used in this Summary are fully identified in the accompanying text.

secure such licenses.

U S WEST believes that requiring CLECs to secure their own licenses is not, as some commentators would argue, a delaying tactic or a demand so burdensome it creates a competitive barrier to entry. Quite the contrary. As SBC and its supporting Affidavit make clear, such a process melds quite appropriately with a third-party intellectual property owner's own commercial interest in expanding its customer base, securing revenues for its intellectual property, and allowing the entity best positioned to know the exact geographic and business scope of the desired license, i.e., the CLEC, to frame the terms of a license agreement accordingly.

Furthermore, the Texas PUC approach eliminates other problematic consequences. First, it removes any confusion about an ILEC's role as a negotiating "agent" for additional licensing authority on behalf of a CLEC. As SBC has demonstrated persuasively, an ILEC cannot be held to the fiduciary obligations of an "agent" in the circumstances under consideration, particularly since it will not be privy to the business plans and objectives of the CLEC. Second, the model decreases significantly the possibility that an ILEC -- despite its best efforts -- will be confronted with allegations of infringing conduct, either vicariously or contributorily. Because the ILEC will not know the specifics of the CLEC's business plan or potential uses of the third-party intellectual property, there will remain the potential that -- regardless of the granting language negotiated -- a CLEC somewhere will use the third-party intellectual property in a manner that exceeds the scope of the license.

After reflecting on all the arguments, U S WEST is convinced that the Commission will agree that, far from being a nefarious scheme calculated to frustrate Congressional intent, the Texas PUC's model is -- as that commission states -- "a considered and reasonable" approach. Not only should this Commission not declare it unlawful, this Commission should adopt it as the most appropriate model to resolve the matter of CLECs' use of third-party intellectual property incorporated into the ILECs' network, operations and services.

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I. **THE APPROACH OF THE PUBLIC UTILITY COMMISSION OF TEXAS ("TEXAS PUC") TO THE MATTER OF ADDITIONAL LICENSING TO ACCESS OR USE OF THIRD-PARTY INTELLECTUAL PROPERTY IS THE MOST REASONABLE APPROACH, FROM BOTH A REGULATORY AND COMMERCIAL PERSPECTIVE.**

The Federal Communications Commission ("FCC" or "Commission") has no inherent authority over matters of intellectual property or licensing.¹ And, the Telecommunications Act of 1996 ("1996 Act" or "Act") granted no such authority to it.² Thus, the general law of intellectual property controls this proceeding. As so artfully articulated by the Texas PUC, while Congress "intended to open up local markets to competition by enacting the 1996 Act . . . [it] did not intend to do so by trampling any intellectual property rights of parties who provide pieces of the

¹ See, e.g., Ad Hoc Coalition of Telecommunications Manufacturing Companies ("Ad Hoc") at 5 n.8 (noting that the Commission lacks authority to engage in compulsory licensing absent express Congressional grant of authority); Ameritech at 4; Bell Communications Research, Inc. ("Bellcore") at 3; Northern Telecom Inc. ("Nortel") at 5; SBC Communications Inc., Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell ("SBC") at 16.

² Compare Ameritech at 4-5.

networks utilized by incumbents, which networks must now be shared with new entrants.”³

The Texas PUC approach is the most reasonable approach, from both a regulatory and commercial perspective. An incumbent local exchange carrier (“ILEC”) is required to identify to potentially-affected competitive local exchange carriers (“CLEC”), within a specified reasonable time, those contracts/vendors⁴ that appear on their face to be insufficient to support the kind of access and use of third-party intellectual property envisioned by the Commission’s rules regarding unbundled network elements and resale.⁵ Once the identification is made, an ILEC

³ Texas PUC at 2-3.

⁴ AT&T Corp. (“AT&T”) takes issue with this “identification process” on the grounds that the CLECs are not privy to the actual contracts between the ILEC and the intellectual property owner. AT&T at 2, 8. See also LCI International Telecom Corp. (“LCI”) at 7. However, no such disclosure is necessary for the process to operate appropriately and with integrity.

An ILEC which inventories its contracts and determines that it is authorized to provide access to or use the intellectual property in question under the terms of the granting license language bears the risk that its interpretation is correct, while at the same time protecting the confidentiality of the agreement (a standard provision in intellectual property agreements). Providing CLECs with an identification of those vendors/contracts where the ILEC believes it is not (or might not be) authorized to provide access or use leaves the ambiguous grants to the CLEC and the intellectual property owner to resolve as they deem appropriate. To the extent this summary procedure might prove to be inadequate in any particular case, an ILEC could be required to provide further information. Compare Sprint Corporation (“Sprint”) at 7 (arguing for a process whereby an ILEC would identify to a CLEC those contracts regarding which the ILEC thought additional licensing was necessary, along with a brief explanation as to why, but not providing the actual contract in the absence of extraordinary circumstances).

⁵ While the matter of access and use of third-party intellectual property is most stark with respect to unbundled network elements, it is not confined solely to those elements. It can appear with respect to resold services, as well, depending on the specifics of the license agreements. See SBC at 14 n.2; Bell Atlantic Telephone

is required to use its best efforts to facilitate the obtaining of any necessary license or right-to-use agreement.⁶ However, the ILEC is not responsible for securing the license, articulating the potential CLEC uses, negotiating the geographic scope of the license or the appropriate fees to be paid. As the Texas PUC correctly observed, this "is a considered and reasonable" approach⁷ to accommodating the conflicting legal interests presented by the existing facts.

Furthermore, there is no evidence in the record to substantiate a finding that licensors would be motivated solely by concerns of lucre such that they would

Companies and NYNEX Telephone Companies ("Bell Atlantic/NYNEX") at 5; GTE Service Corporation ("GTE") at 5-6; Nortel at 8 (noting that intellectual property issues might not arise in resale if there is no "electronic" access to the vendor's software); Lucent Technologies Inc. ("Lucent") at 2-3 (observing that the concerns of intellectual property owners might be less with resold services than with unbundled network elements but refusing to make an "absolute general statement" to that effect), 4 (noting that software development platforms licensed to develop telecommunications applications, if used by a CLEC to develop its own applications, would be outside the scope of the licenses with the ILECs). With respect to the latter observation, compare GTE's remark that at least one vendor of advanced intelligent network ("AIN") capabilities has advised it that a proposed CLEC use would be outside the scope of the license. GTE at 5-6. And compare Lucent at 4.

⁶ See Texas PUC at 4-5 (suggesting that this obligation lends to the negotiation process any bargaining power or leverage that an ILEC may, in fact, have). Compare Bell Atlantic/NYNEX's reference to a standard of "commercially reasonable best efforts." Bell Atlantic/NYNEX at 4.

U S WEST does not support a standard requiring the exertion of "best efforts" in the circumstances discussed herein. We believe the more appropriate standard is one requiring the exertion of "commercially reasonable efforts." This latter standard accomplishes the appropriate balance attendant to any "facilitation conduct" and avoids the inevitable disputes over what might constitute "best" efforts in any given situation. In essence, we see no reason to buy additional contention in this area given the competitive relationships between ILECs and CLECs. Such parties are generally not well suited to "cooperative" relationships, and that is as it should be.

⁷ Texas PUC at 4.

proceed in a commercially unreasonable manner. Parties such as MCI in its Petition and LCI in its comments⁸ engage in "wholly unsupported speculation about a 'strong possibility' that ILECs would pressure third parties to refuse to extend licenses to CLECs or to delay the grant of licenses"⁹ or would engage in other commercially unreasonable behavior.

Just the opposite behavior would be expected. As SBC points out, it is just as reasonable to assume that licensors, who are "in the business of authorizing the use of their products by carriers,"¹⁰ would seize the opportunity to secure a new customer base and revenue streams and would attempt to optimize the good will and commercial relationships between the parties.¹¹

Furthermore, intellectual property owners are on record in this proceeding as intending to proceed with any necessary negotiations in a commercially reasonable manner. As noted by a number of intellectual property owners, they are businesses

⁸ LCI suggests a number of licensor practices which it characterizes as probable but unreasonable (jacking up the price because the CLEC has no bargaining power with respect to existing technology; refusal to license). LCI at 5-6. For example, LCI argues that an ILEC identification of a contract/vendor as not currently allowing CLEC access or use puts a licensor with "no legitimate claim" in a position to extract at least a nuisance payment from a CLEC. *Id.* at 4. If the CLEC can make out a sound, legally compelling argument that the license already includes the CLEC's intended access or use, and with the ILEC's commercially reasonable efforts to facilitate the resolution of the matter factored in, the situation LCI describes would not be the anticipated outcome. Furthermore, the fact that a licensor may demand right-to-use recoveries through a per-use, rather than a lump-sum, recovery does not suggest anything nefarious, as suggested by LCI at 4.

⁹ SBC at 19, citing to MCI Petition at 5-6. See also Affidavit of Roger M. Milgrim ("Milgram Aff.") (attached to SBC comments) at 15 ¶ 23.

¹⁰ SBC at 19.

¹¹ Milgram Aff. at 15-16 ¶¶ 24-26. See also GTE at 9.

that understand the nature of “commercially reasonable” conduct and have every incentive to arrive at a satisfactory license agreement between themselves and new entrants.¹²

The representations of intellectual property owners regarding their intent and fair conduct stand in stark contrast to the unsupported, speculative arguments of those asserting that the ILECs have a superior bargaining position that can be used to harm CLECs,¹³ or should use such purported bargaining power in support of CLECs’ business interests and advancement,¹⁴ and that entering into license agreements with intellectual property owners would involve “protracted and likely contentious negotiations”¹⁵ likely to depress new entry into the Millennium. As

¹² See, e.g., Nortel at 2 (“Nortel is willing to enter into reasonable agreements with either or both sets of carriers to accomplish [the] goals” of providing CLECs access to desirable intellectual property), 7 (Nortel should be entitled to contract for certain reserved rights with CLECs and it is “willing to work with . . . requesting parties to accommodate their reasonable requests”), 8 (Nortel “will endeavor to deal promptly and in a commercially-reasonable manner with any and all parties in order to enter into agreements to protect its rights.”), 9. See also Ad Hoc at 5 n.8.

¹³ See MCI Petition at 5-6; LCI at 4-6; Telecommunications Resellers Association (“TRA”) at 9. Compare Ad Hoc at 4 (noting that MCI offers no evidence for its assertion that ILECs have superior bargaining power over CLECs, particularly large ones like MCI); Bell Atlantic/NYNEX at 4 (noting that MCI offers no evidence for its assertion that an ILEC’s bargaining power would be superior, for example, to a CLEC’s negotiating a license on a national basis, and perhaps jointly with respect to interexchange and local service); SBC at 28 (making the same argument as Bell Atlantic/NYNEX); Milgram Aff. at 16 ¶ 26.

¹⁴ AT&T at 2-3, 13; TRA at 9.

¹⁵ TRA at 2, 6 (having to secure licenses constitutes an “onerous burden[]”), 8 (“protracted negotiations . . . will present a potentially insurmountable barrier to entry”); Competitive Telecommunications Association (“CompTel”) at 5 (costs and efforts to secure licenses would be prohibitive); LCI at 4 (efforts to reach agreements is likely to be substantial). Contrary to this unsupported advocacy, as SBC points

Nortel persuasively argues, the "theoretical risk" identified by parties such as MCI, "must be balanced against the very real adverse effects to third-party manufacturers if their rights are not allowed to be protected."¹⁶

For all of the above reasons, the Commission should hold that the process established by the Texas PUC is a reasonable one, from both a commercial and regulatory perspective. It should decline to interfere in such a process. Indeed, the Commission should adopt a similar regulatory philosophy at the federal level.

II. SBC IS CLEARLY CORRECT IN ITS STATEMENT OF THE "LAW OF THE CASE" AND WITH RESPECT TO THE FACT THAT ILECS SHOULD NOT BE REQUIRED TO ACT AS NEGOTIATING AGENTS FOR CLECS IN THE AREA OF SECURING NECESSARY LICENSES.

As SBC persuasively demonstrates throughout its filing and its attached

Affidavit:

- The law of intellectual property is such that a licensee has only those rights granted to it by a licensor.¹⁷ The prevailing legal standard is that rights not granted are reserved to the licensor.¹⁸ While such licenses often also contain

out, many of the license contracts would involve Lucent, which apparently does not see the need for substantial additional contracting. SBC at 20; and see Lucent at 3.

¹⁶ Nortel at 3 (focusing there on MCI's arguments that ILECs are using intellectual property arguments "to preclude or delay entry by competitors").

¹⁷ SBC at 4; Milgram Aff. at 6-7 ¶ 12, 8-10 ¶¶ 15-16. See also Bartsch v. Metro-Goldwyn-Mayer, Inc., 391 F.2d 150, 154 n.1 (2nd Cir. 1968); Cohen v. Paramount Pictures Corp., 845 F.2d 851, 853 (9th Cir. 1988). And see Margret Rey v. Richard G.D. Lafferty, et al., 990 F.2d 1379 (1993) (discussing different interpretive approaches to license contracts, focusing on unforeseen technological developments).

¹⁸ Compare Ad Hoc at 2-3 ("[M]anufacturers often retain property rights in the products they sell to LECs. These rights include copyrights with respect to software, patent rights covering a specific product or the method by which the product works, technical information that constitutes trade secrets under State or Federal law, and contract rights restricting the manner in which the ILEC may use a particular product." (emphasis in original)); Bellcore at 2 ("[U]nderlying [intellectual property] IP rights in the software may include, the copyright in the

express restrictions on use,¹⁹ the rights of the licensee are primarily determined by the “granting” language, not the prohibition language.²⁰

- If an ILEC has not been granted sufficient rights to allow unaffiliated parties to access or use the intellectual property of a licensor, the ILEC has no legal authority to permit such access and use.²¹ Indeed, allowing such access or use would place the ILEC in a position of infringement.²²
- An ILEC should not be required to “negotiate” expanded licenses on behalf of unaffiliated parties. For a number of valid legal and policy reasons, the “equities”²³ do not favor such an approach. **First**, it interferes with the otherwise commercially reasonable practice of allowing vendors to increase the diversity of licensees and revenue streams associated with its intellectual property.²⁴ **Second**, the ILEC cannot intelligently negotiate the appropriate scope of a license personal to the CLEC. The ILEC, being unaware of the business plans of the CLEC (as it should be), cannot begin to know or appreciate the actual scope (either geographic or otherwise) of the necessary or appropriate license; nor can it control the potential infringing uses of the license if the license remains scoped to its existing granting language.²⁵

code or related documentation, patents that may govern the operation of the software or an interface to the network element, and any trade secrets embodied in the software or contained in the network element interface.”)

¹⁹ See *Nortel* at 3 (its customers “expressly are obliged to treat the licensed software and any proprietary information divulged to them as confidential, and not to disclose such software or information to unauthorized third parties”); *Lucent* at 1-3, 4, 6; *Milgram Aff.* at 7-8 ¶ 13.

²⁰ Thus, AT&T’s argument that SBC “has not taken a position on whether [an intellectual property owner’s] rights would . . . be violated by the provision of unbundled [network] elements,” (*AT&T* at 8) misses the mark with respect to the appropriate standard.

²¹ See *Ameritech* at 3.

²² See *Ad Hoc* at 5-6 (an ILEC could well be subject to a “substantial claim for damages by unwittingly using the property of a third party without authorization”); *SBC* at 4-5 (noting that an ILEC could be subject to a claim for contributory infringement where it makes “available the instrumentalities for another’s infringing activity”) 18; *Milgram Aff.* at 9-10 ¶ 16, 13-14 ¶ 21.

²³ *TRA* at 9, arguing that the “equities” argue for an approach whereby ILECs engage in any necessary negotiation and secure any required additional licenses.

²⁴ See nn.10-11 *supra*; *Milgram Aff.* at 15-16 ¶¶ 24-26.

²⁵ See *SBC* at 11-12 (noting that an ILEC will not know, and cannot reasonably be expected to anticipate, the CLEC’s use of an unbundled network element as part of

Third, the ILEC cannot be asked to operate as an “agent” for the CLEC under facts that make it obvious that the ILEC cannot conform its behavior to the “fiduciary” obligations of an agent.²⁶

SBC presents compelling legal, commercial, and policy arguments why the MCI proposal presented in its Petition should be rejected. In a submitted Affidavit (Milgram Aff.), Professor Roger M. Milgram outlines the general law of intellectual property as it might relate to telecommunications services and network systems, describing not just the “type” of intellectual property rights one might expect to find,²⁷ but also the type of negotiating conduct one would expect *vis-à-vis* the licensor and the licensee.²⁸ He stresses the criticality of any contractual language to the rights actually licensed and obtained.²⁹

With that general introduction in mind, Professor Milgram opines on SBC’s status under the contracts he reviewed (which were mostly software contracts). His preliminary, foundational conclusion is that the licenses “are nonexclusive and

its own network), 18, 25; Milgram Aff. at 16-17 ¶ 27; GTE at 2, 8-9. Compare Lucent at 3 (noting that whether or not additional license fees would be required would depend, in part, on the “nature of the access and use contemplated by the CLEC when it purchases access to unbundled [network] elements or resells services”).

²⁶ SBC at 21-23. Compare Ameritech at 6 (“[H]ow could an ILEC negotiate with an equipment vendor on behalf of a CLEC competitor when any price that is negotiated would be immediately suspect?”); GTE at 8 (the potential for disputes over whether the “best rate and terms possible” were secured is significant).

²⁷ Milgram Aff. at 3-6 ¶¶ 7-11.

²⁸ Id. at 7-9 ¶¶ 13-15.

²⁹ Id. at 9-10 ¶ 16.

many of the license agreements have grants that are expressly **personal and nontransferable.**"³⁰

Professor Milgram notes that, in several instances, the license grant is restricted to SBC and its affiliates for their own internal business use.³¹ He further notes that, in some instances, subcontracting or sublicensing is expressly prohibited.³² He also notes that, in some cases, the software license is site- or CPU-specific.³³ He declares that in a small minority of contracts, the granting language is broad (i.e., "for any lawful purpose"), but notes that even in contracts using broad granting language there might be a provision prohibiting assignment or subcontracting.³⁴ He concludes by stating that "[a]ny use or handling of the software in a manner that is prohibited . . . and likely . . . beyond use or handling authorized in the agreement, would be a fundamental, material breach of the licensor's intellectual property rights."³⁵

The above clearly demonstrates that the arguments presented by SBC, and found compelling by the Texas PUC, are not frivolous or specious. Indeed, the positions are grounded in a fundamental respect for intellectual property law and the societal benefits that inure from protection of those rights. The process

³⁰ Id. at 12-13 ¶ 19 (emphasis in the original). Compare Lucent at 3 (noting that this is the format of many of its licenses).

³¹ Milgram Aff. at 12-13 ¶ 19.

³² Id.

³³ Id.

³⁴ Id.

³⁵ Id.

approved by the Texas PUC takes into account, and accommodates intellectual property law, contract law, agency law, and reasonable commercial practice. That practice should be emulated, not declared unlawful under a federal statute that nowhere specifically and substantively addresses the matter before the Commission.

III. **CONTRARY TO THE STRONG LEGAL AND POLICY ARGUMENTS PRESENTED BY THOSE SUPPORTING CLEC-NEGOTIATED LICENSES IN THOSE CIRCUMSTANCES WHERE ADDITIONAL LICENSING IS LEGALLY REQUIRED, THOSE OPPOSING THE POSITION PRESENT LITTLE IN THE WAY OF LEGAL SUPPORT AND EVEN LESS IN THE WAY OF FACTUAL OR POLICY SUPPORT.**

Contrary to the strong legal argument proffered by SBC, and supported by its well-drafted, well-documented Affidavit, those opposing the SBC approach to licensing of unbundled network elements -- **in those circumstances where the ILEC lacks the requisite rights to allow third-party access and use** -- pass off the legal arguments in short rhetorical epithets³⁶ and pay short shrift to the law of the matter.³⁷ Those commentators allege that -- right or wrong -- the FCC has already ruled on this matter, if only by implication: i.e., ILECs are required to provide access to these elements and, therefore, they must secure the necessary

³⁶ MCI Petition at 1 (suggesting that the SBC position is a "guise"); TRA at 2 (arguing that the intellectual property arguments advanced by SBC and other ILECs constitute a "ploy"), 7 (that ILECs are "engaging in . . . tactic[s]"); LCI at 6 (ILECs are engaging in "tactics"); CompTel at 4 (arguing that the intellectual property arguments bear the "earmark of being an illusory requirement concocted by one ILEC").

³⁷ AT&T is really the only commentator to pay any attention to the intellectual property law involved in the facts before the Commission. AT&T at 2, 19-20.

licenses to provide the access.³⁸ Additionally, certain commentators argue that past ILEC practices in making certain systems available in conjunction with the sale of access services³⁹ and other services,⁴⁰ strongly suggest that the current intellectual property arguments being articulated by ILECs are disingenuous. Finally, commentators press the notion that there might be a double payment required for additional licensing, claiming such to be totally inappropriate since license fee recoveries are already contained in TELRIC or in the resale price for resold services.⁴¹ These commentators are incorrect in all their unsubstantiated arguments.

AT&T is the only commentator that actually attempts to address the law of intellectual property, apart from the "law" of the Commission's Interconnection and Infrastructure Sharing Orders. However, AT&T's discussion of the controlling legal principles is weak, stemming as it does from AT&T's erroneous assumptions that the current arguments regarding third-party intellectual property rights are "baseless"⁴² and mere "fabrications;"⁴³ and that the law of intellectual property holds little in the way of protections to intellectual property owners when unbundled

³⁸ These parties cite not only to the FCC's First Report and Order in CC Docket No. 96-98 (CompTel at 2; LCI at 2, 3, 4, 6-7, 8; TRA at 2-5, 7-8) but TRA even cites to the FCC's recent Order in the Infrastructure Sharing proceeding, CC Docket No. 96-237 (TRA at 6 n.13, 10 nn.18-19).

³⁹ CompTel at 4.

⁴⁰ AT&T at iii, 2, 22-27 (citing to loops, switching, databases, signaling, dedicated transport, digital cross connections and certain AIN capabilities).

⁴¹ Id. at 14. Compare LCI at 9.

⁴² AT&T at 2.

⁴³ Id.

network elements are used by CLECs.⁴⁴ Generally, AT&T's substantive legal discussion lacks substance and is not very valuable to an educated analysis of the issue.

Furthermore, AT&T's analysis -- like that of MCI's -- stems from the flawed assumption about the importance of "direct access" or "physical control" of a network element (asserting that both are absent with respect to a CLEC's access/use).⁴⁵ As noted by Bellcore, the issue is not whether there is "direct access" to an intellectual property owner's property (although intellectual property owners may have concerns along a continuum and some may be concerned most particularly about direct access).⁴⁶ The issue is whether a carrier "obtains access to the protected features, functions, interfaces and information contained in the software system . . . and uses, discloses, displays, copies or transmits such 'Technical Information' for its commercial benefit."⁴⁷ Or, stated another way, the issues herein deal with "intangible rights of use or dissemination rather than

⁴⁴ Id. at 20 (claiming that "copyright laws . . . make[] it unlikely that third-party vendors would be able to raise meritorious claims in the event that a LEC provided access to network elements" "[b]ecause a CLEC would not generally engage in copying or distribution when it provided service through unbundled elements[.]").

⁴⁵ MCI emphasized that title to an unbundled network element did not pass to the CLEC, and that the ILEC remained in physical control of its network. MCI Petition at 7. Similarly, AT&T stresses the same point. AT&T at 7, 20-21. And see LCI at 2. However, intellectual property rights are intangible rights not dependent on title or physical control. See SBC at 9 (noting that SBC could well have "physical control" of software, but the title and the bundle of intellectual property rights not granted to SBC is reserved to the intellectual property owner).

⁴⁶ See, e.g., Nortel at 6-7 (stating that it would be most concerned about direct access).

⁴⁷ Bellcore at 2.

physical ownership of the tangible objects in which the intellectual property is embodied.”⁴⁸

A CLEC which receives the benefit of the operation of the software or a particular application of that software, or information retrieved in part through the use of that software, may well receive that benefit unlawfully if the receipt is obtained through software applications or operations beyond the scope of the ILEC’s license and in the absence of the owner’s permission.⁴⁹ Furthermore, a license violation may not be the result of access or usage per se, but the fact that the usage assumptions associated with the license will have changed as a result of third-party usage, requiring additional permission from the intellectual property owner.⁵⁰

Arguments proffered by commentators such as AT&T and CompTel that ILECs have made intellectual property available to parties for eons⁵¹ ignore the fundamental distinction between an ILEC providing a “service” and an ILEC providing “exclusive access to an entire facility, or use of some feature, function or

⁴⁸ SBC at 3.

⁴⁹ Id. at 2-3. A “gateway” to systems that utilize or incorporate others’ intellectual property (such as software) does not necessarily alleviate the problem. To the extent that the gateway interacts with existing systems, which operate under existing software licenses, in order to extract the necessary information for display to the CLEC, there remains an argument that the software is being used, not for the ILEC’s business purposes but for that of the CLEC. To the extent the existing licenses do not authorize the use of the software for the commercial benefit of a third-party service provider, the CLEC would be using the owner’s “software system” without permission.

⁵⁰ See Nortel at 6 n.9; Lucent at 4. And see GTE at 8-9.

⁵¹ AT&T at 2, 22-27; CompTel at 4.

capability" in the form of a network element.⁵² Once a CLEC purchases a network element, it is "entitled to exclusive use of that facility for a period of time[.]"⁵³ the provision of an unbundled network element.⁵⁴

While AT&T and CompTel find the "service/network element" argument specious, relying on ILECs' past practices, those practices are simply not relevant to the instant analysis. A licensor could well claim that there is a material difference between an ILEC providing a service to the public (or a portion of the public), wherein the ILEC would be using the intellectual property for its own business purposes, and that same ILEC providing access to a system or facility for the exclusive use of another, so that the other entity could provide its own service to the public (or a portion of the public).⁵⁵

⁵² In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order, 11 FCC Rcd. 15499, 15631 ¶ 258 (1996) ("Interconnection Order"), appeals pending sub nom., Iowa Utilities Board, et al. v. FCC, CN 96-3321, et al. (8th Circuit). See also SBC at 9, 15.

⁵³ Interconnection Order at 15635 ¶ 268.

⁵⁴ AT&T anticipated this argument, but claims it is immaterial because "the fact is that in each instance carriers obtained the functionalities of a discrete and identifiable facility or equipment." AT&T at 22. And see CompTel at 4.

⁵⁵ The fact that not all vendors might take this position does not render it any less a valid one with respect to those that do. Therefore, Nortel's observations that it is most concerned with direct access and modifications of its intellectual property (Nortel at 6-7) and Lucent's position that, as a general matter, an ILEC's provision of resold services or access to unbundled elements in accordance with Section 251 of the Act would constitute an ILEC's "own" or "internal" business purpose (Lucent at 3), does not preclude other licensors from maintaining a different, but equally valid, position. Compare Lucent at 5 (addressing a CLEC's use of a network element purchased from an ILEC in combination with the CLEC's own network).

Finally, those commentators which argue that the SBC position is out of line because it results in a CLEC paying twice for license rights⁵⁶ ignore the fact that, in those situations where there are additional rights required, there will be “two payments” (or a single “enlarged” payment, depending on the circumstances). The “license fees” currently included in at least U S WEST’s cost studies are for the right-to-use and license amounts paid by U S WEST today for its right to use the intellectual property of others. Without U S WEST, as the foundation service and network element provider, continuing to have the right to use the intellectual property in question, no other third party could possibly ride on our network. Thus, it is entirely appropriate to include the “costs” of these foundational agreements in the cost studies we submit.

To the extent that a licensor claims that additional amounts are due and owing, there will be either a second payment (and revenue stream) from the CLEC for the additional rights; or the ILEC will be required to pay more than it is currently paying (in a single lump sum, perhaps, but covering additional internal and third-party use). In any event, there is no “double burden” (as contended by AT&T)⁵⁷ because the costs in both instances are real and directed to different aspects of the licensing arrangements.

⁵⁶ See AT&T at 14 (arguing that right-to-use fees are already included in the cost studies submitted by ILECs). Compare LCI at 9.

⁵⁷ AT&T at 14.

IV. CONCLUSION.

The Commission should refrain from imposing an obligation on ILECs to negotiate with third-parties for license rights broad enough to cover CLEC conduct on legal and policy grounds. As SBC persuasively argues, ILECs cannot operate as “agents” for CLECs where the facts of the situation make it impossible for the ILEC to operate with the appropriate level of fiduciary conduct. The ILEC does not know (and should not know) the CLEC’s business plan or how (for example) information retrieved from a CLEC through the vehicle of another’s intellectual property (software) is going to be used downstream. Only the CLEC knows this; only the CLEC is in a position to negotiate with the intellectual property owner the appropriate bundle of rights to allow the CLEC to use the intellectual property in a non-infringing manner yet still consistent with its own business needs.

Furthermore, as Nortel and Lucent persuasively argue, the protection of intellectual property “fosters innovations which, in turn, benefits the public by encouraging the design and development of new products and services”⁵⁸ and “creates incentives for the deployment of new and advanced telecommunications technologies,”⁵⁹ -- a specifically articulated goal of the 1996 Act. “[I]ntellectual property serves as the basis of [an intellectual property owner’s] innovations

⁵⁸ Nortel at 4.

⁵⁹ Id. at 5.

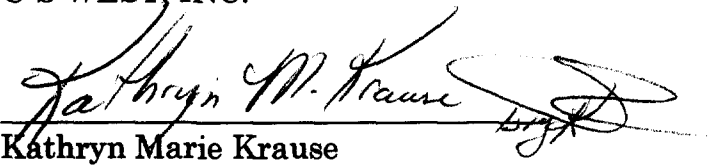
relating to products and services of all kinds, and is therefore [a] most valuable asset[].⁶⁰

The approach taken by the Texas PUC is an eminently reasonable one from both a commercial and regulatory perspective. At most, the Commission should require a similar process.

Respectfully submitted,

U S WEST, INC.

By:


Kathryn Marie Krause
Suite 700
1020 19th Street, N.W.
Washington, DC 20036
(303) 672-2859

Its Attorney

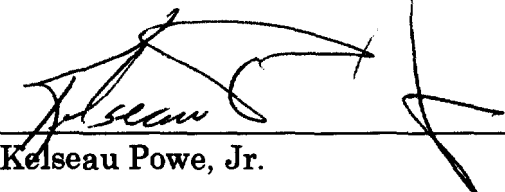
Of Counsel,
Dan L. Poole

May 6, 1997

⁶⁰ Lucent at 1.

CERTIFICATE OF SERVICE

I, Kelseau Powe, Jr., do hereby certify that on this 6th day of May, 1997, I have caused a copy of the foregoing **REPLY COMMENTS OF U S WEST, INC.** to be served via first-class United States Mail, postage prepaid, upon the persons listed on the attached service list.



Kelseau Powe, Jr.

***Via Hand-Delivery**

(CC9698N.COS/BM/lh)

***James H. Quello**
Federal Communications Commission
Room 802
1919 M Street, N.W.
Washington, DC 20554

***Reed E. Hundt**
Federal Communications Commission
Room 814
1919 M Street, N.W.
Washington, DC 20554

***Susan P. Ness**
Federal Communications Commission
Room 832
1919 M Street, N.W.
Washington, DC 20554

***Rachelle B. Chong**
Federal Communications Commission
Room 844
1919 M Street, N.W.
Washington, DC 20554

***Regina M. Keeney**
Federal Communications Commission
Room 500
1919 M Street, N.W.
Washington, DC 20554

***Richard K. Welch**
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

***Janice M. Myles**
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

***Kalpak Gude**
Federal Communications Commission
Room 544
1919 M Street, N.W.
Washington, DC 20554

***International Transcription
Services, Inc.**
Suite 140
2100 M Street, N.W.
Washington, DC 20037

Lisa B. Smith
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, DC 20006

Donald B. Verrilli, Jr.
Kevin J. Landy
Jenner & Block
601 13th Street, N.W.
Washington, DC 20005

MCI

James D. Ellis
SBC Communications, Inc.
Room 1254
175 East Houston
San Antonio, TX 78205

Martin E. Grambow
SBC Communications, Inc.
Suite 1000
1401 I Street, N.W.
Washington, DC 20005

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
Harlie D. Frost
Southwestern Bell Telephone Company
Suite 3520
One Bell Center
St. Louis, MO 63101

Randall E. Cape
Pacific Telesis Group
Room 1517
140 New Montgomery Street
San Francisco, CA 94105

Michael J. Karson
Ameritech Telephone Companies
Room 4H88
2000 West Ameritech Center Drive
Hoffman Estates, IL 60196-1025

Lawrence W. Katz
Edward D. Young, III
Michael E. Glover
Bell Atlantic Telephone Companies
1320 North Court House Road
Arlington, VA 22201

Jack M. Farris
Donald Rowe
NYNEX Telephone Companies
Room 3812
1095 Avenue of the Americas
New York, NY 10036

Gena L. Ashe
Mary McManus
Lucent Technologies, Inc.
Suite 700
900-19th Street, N.W.
Washington, DC 20006

Charles M. Hunter
Catherine M. Hannan
Hunter Communications Law Group
Suite 701
1620 I Street, N.W.
Washington, DC 20006